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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 289

PUBLIC SERVICE TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WKAT, INC., EASTERN AIR LINES, INC., NORTH DADE VIDEO, INC., ELZEY ROBERTS, AND L. B. WILSON, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

NORMAN E. JORGENSEN
WILLIAM I. DENNING

Attorneys for
Public Service Television, Inc.

2011 Eye Street, N. W.
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Public Service Television, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, entered on July 6, 1961, setting aside the Federal Communications Commission's award, made on February 8, 1957, of Channel 10, Miami, to Public Service Television, Inc., and authorizing entry of an award favoring L. B. Wilson, Inc.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 1a-8a) is not as yet officially reported, but is unofficially reported in 21 Pike & Fisher Radio Regulations 2100. The decision of the Federal Communications Commission and the initial decision of the hearing examiner (S.J.A. 29 FCC 216-240)[1] are reported in 29 Federal Communications Commission Reports 216.

JURISDICTION

The judgment of the court below was entered on July 6, 1961, Appendix A, pp. 8a-9a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Section 409(c)(2) of the Federal Communications Act provides that "In any case of adjudication . . . which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before . . . the Commission . . . shall . . . directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate". The first question presented is whether the Commission may, notwithstanding an express refusal to find a violation of Section 409(c)(2)

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[1] "S.J.A." designates the portion of the record printed as a supplemental joint appendix in the court below. By stipulation of the parties, this supplemental joint appendix is paginated in accordance with the appropriate pages of Volume 29 of the Federal Communications Commission Reports, containing the initial decision of Hearing Examiner Horace Stern, adopted December 1, 1958, and the Commission's decision, adopted July 14, 1960. "J.A." designates the portion of the record printed as a joint appendix in the court below.

by the Commission, set aside an award to an applicant upon grounds of *ex parte* presentation.

2. Even assuming that a non-legislative standard respecting *ex parte* approaches may be imported into cases arising under the Communications Act, the second question presented is whether the Commission and the Court below applied this standard arbitrarily and capriciously in holding petitioner's *ex parte* conduct disqualifying while holding that there was no irregularity in the *ex parte* conduct of Senator Smathers on behalf of L. B. Wilson, Inc.

3. Section 312 of the Communications Act provides that the Commission shall before revoking a construction permit provide proper notice to the permittee by means of an order to show cause, and hold an evidentiary hearing in which both the burden of proceeding with the introduction of the evidence and the burden of proof shall be on the Commission. The ~~second~~ third question presented is whether the Commission may set aside and revoke the grant of a construction permit without observing these statutory requirements.

4. The ~~third~~ fourth question presented is whether the Commission may set aside an award to an applicant on the sole grounds of *ex parte* presentation, without weighing other relevant qualifications and circumstances.

STATUTES INVOLVED

The relevant provisions of the Communications Act, as amended (48 Stat. 1064, 47 U.S.C., Section 151 *et seq.*), are as follows:

ADMINISTRATIVE SANCTIONS

Sec. 312—

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to Section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe, any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States; and

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of Section 1304, 1343, or 1464 of Title 18 of the United States Code.

(b) Where any person

(1) has failed to operate substantially as set forth in a license,

(2) has violated or failed to observe any of the provisions of this Act, or Section 1304, 1343 or 1464 of Title 18 of the United States Code, or

(3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor, and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In the case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of § 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect

to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

* * * * *

GENERAL PROVISIONS RELATING TO PROCEEDINGS—

WITNESSES AND DEPOSITIONS

SEC. 409 . . .

(e) . . .

(2) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before an examiner or examiners or the Commission, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate.

. . .

STATEMENT

Following a consolidated comparative proceeding involving the mutually exclusive applications of WKAT, Inc., L. B. Wilson, Inc., North Dade Video, Inc., and petitioner, Public Service Television, Inc., for a permit to construct a television station on Channel 10, Miami, Florida, the hearing examiner issued an initial decision on March 30, 1955, awarding the permit to WKAT, Inc. (S.J.A. 29 FCC 222) The Commission reversed the examiner and granted a construction permit to petitioner, which constructed a station and began broadcast operations.

The award to petitioner was appealed to the court below, jurisdiction having been invoked pursuant to the provisions of Section 402(b) of the Communications Act. While the appeal was pending, charges were aired in hearings before the House Subcommittee on Legislative Oversight which raised a question whether some of the applicants had improperly approached certain of the Commissioners who had decided the case. On April 17, 1958, the court below remanded the case for an evidentiary hearing to determine whether misconduct had occurred and if so whether it was attributable to any parties to the proceeding (J.A. 80-82).

A hearing was held before a specially-appointed hearing examiner, Judge Horace Stern. At the hearing, the Commission expressly refused to accept any burden of proof (J.A. 144, 147), and the hearing examiner excluded, as irrelevant, evidence bearing on the relative or comparative merits of the parties or the over-all character qualifications of petitioner, since in his view the remanded proceeding was an inquiry limited solely to four specified issues, all concerning the matter of *ex parte* approaches (J.A. 84, 142, 147-148, 178-184).

On December 1, 1958, the hearing examiner issued his initial decision, finding *inter alia* that Commissioners Mack and McConnaughey had received representations regarding the case which were not disclosed on the record.[2] With particular reference to peti-

[2] The hearing examiner also found that a memorandum in favor of North Dade Video, Inc., one of the applicants, was sent to Commissioner Craven (S.J.A. 29 FCC 239) and the Commission found that principals of North Dade Video, Inc., met and talked with Commissioners Sterling and Hyde *ex parte* (S.J.A. 29 FCC 217, 220).

tioner, the examiner found that Public Service had sought to engage Thurman Whiteside, a local Miami attorney, as counsel of record, that Whiteside refused such employment with a promise that he would "help", that he did endorse Public Service in private conversations with Commissioner Mack and that he later withdrew this endorsement. The examiner expressly found that although Public Service knew that Whiteside and Mack were friends, Public Service did not have knowledge of any financial relationship between them. (S.J.A. 29 FCC 231-232, 235, 238; J.A. 109). With particular reference to L. B. Wilson, Inc. there was undisputed evidence that Senator Smathers of Florida, executor of L. B. Wilson's estate, discussed the application of L. B. Wilson, Inc. with Commissioner Mack on two occasions, one of which was in the Commissioner's office (J.A. 89-90).

The examiner concluded that while petitioner did not retain Mr. Whiteside, it had tacitly ratified his conduct (S.J.A. 29 FCC 232, 238, 239). However, he expressly refused to find that petitioner had violated Section 409(c)(2) of the Act which forbids any person who has "participated in the presentation or preparation for such presentation of such case" from directly or indirectly making any additional presentation respecting such case, unless with notice and opportunity for all parties to participate (J.A. 110). The examiner made no finding respecting the *ex parte* approaches of Senator Smathers on behalf of L. B. Wilson, Inc. He concluded that the award to petitioner was only voidable and that none of the applicants was automatically disqualified from receiving a grant of its application. In his view the public interest required that the adverse effect of any misconduct be weighed along with all

the other relevant factors in a further comparative proceeding (S.J.A. 29 FCC 239-240, 237). The Commission, in a decision adopted July 14, 1960, modified the initial decision by disqualifying three of the applicants (WKAT, Inc., North Dade Video, Inc., and petitioner), without consideration of any other relevant factors. The Commission held that the "approach" of Senator Smathers on behalf of L. B. Wilson, Inc. was not improper (S.J.A. 29 FCC 220). It set aside the grant of construction permit to petitioner, and awarded a four-month default grant of a license to L. B. Wilson, Inc. (S.J.A. 29 FCC 216-220). The Commission did not disturb the examiner's refusal to find a violation of Section 409(e)(2).

The court below concluded that the order proposed to be adopted by the Commission was well within its authority, holding that the doctrine of *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514, 541 (C.A. 3), certiorari den., 335 U.S. 912, which involved bribery of a judge in a judicial proceeding, "applies to the adjudicatory functions of an administrative agency". It also held that "counterbalancing considerations of public interest in the service involved" would not justify an award to petitioner despite misbehavior, citing *F.C.C. v. WOKO*, 329 U.S. 223, 229. Accordingly, it ordered that the original grant of award to petitioner "will be set aside, and the case is remanded to the Commission for entry of its proposed order." (Appendix, *infra*, pp. 5a, 6a, 8a)

REASONS FOR GRANTING THE WRIT

The decision of the court below raises questions of substantial importance in the administration of the Communications Act and administrative agencies generally.

1. By its holding that the doctrine of the *Root Refining* case, *supra*, respecting *ex parte* influence in the context of a judicial proceeding, "applies to the adjudicatory functions of an administrative agency", the court below disregards the specific and carefully limited legislative language contained in Section 409(c)(2) of the Communications Act, dealing with the subject matter involved.[3] Section 409(c)(2) by its terms prohibits *ex parte* representations only when made by persons who have "participated in the presentation or preparation for presentation of such case" before the Commission. Congress has deliberately rejected efforts to enlarge the scope of this provision, despite the fact that numerous proposals to amend the Section have been made and a bill to broaden the provision is pending during the present session.[4] See-

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[3] The *Root* case it should be noted, involved bribery of a judge. The instant case involves at most an *ex parte* presentation on the merits.

[4] Ex-Commission Chairman Ford, testifying at Congressional hearings, emphasized the limited nature of the prohibition contained in Section 409(c)(2) and the need for legislation to broaden the prohibition:

> In other words, it does not say 'no person,' but it just says no person who has participated, which, of course, exempts everybody else under the sun. So here, as a matter of law, this statute permits ex parte contracts, or does not prohibit them, and by implication it exempts them.

Hearings on Independent Regulatory Agencies Legislation, 86th Cong., 2nd Sess., p. 86 (1960). See also, H.R. 14, 87th Cong., 1st Sess. (1961).

tion 409(c)(2), which the Commission expressly refused to find that petitioner had violated, embraces the sole legislative standard governing the propriety of ex parte contacts. The court's blanket proscription of all ex parte contacts before the Commission imports concepts in conflict with the explicit provisions of the Communications Act, and other regulatory statutes. All applicants before the Commission and other administrative agencies operating pursuant to similar legislative provisions respecting ex parte presentations are placed in doubt and confusion by the court's ruling, and run the serious risk of penalties imposed based upon standards unknown to the letter or spirit of the applicable congressional enactments.

2. The Commission disqualified petitioner because it found that Whiteside, as an "emissary" of petitioner, made *ex parte* representations to Commissioner Mack. The Commission awarded Channel 10 to L. B. Wilson, Inc., because it found that Senator Smathers, as Wilson's executor, committed no impropriety in discussing Commissioner Mack's vote on the Wilson application with Commissioner Mack in the Commissioner's office. This failure of the Commission to dispense even-handed justice respecting *ex parte* approaches in this and other substantially similar cases is arbitrary and capricious.[5] Such a flagrant departure

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[5] *Cf. WHDH, Inc.*, 20 Pike & Fischer Radio Regulations 395 (*ex parte* luncheon with Commissioner results in comparative demerit, not absolute disqualification) with *Petersburg Television Corp.*, 21 Pike & Fischer Radio Regulations 311 (*ex parte* dinner with Commissioner results in confirmation of award). See also the proceeding in Channel 4 Pittsburgh where the Commission did not reopen the award despite the statement of the then Chairman McConnaughey that an interested party in discussing the merits of the case at an *ex parte* luncheon stated that "he might possibly be in a position to throw my son some business." Hearings before the Harris Committee, 86th Cong., 1st Sess., pp. 5325, 5327 (1958).

from elementary due process warrants review by the Supreme Court.

3. The Commission with the approval of the court below has set aside the construction permit for Channel 10, Miami, Fla., previously awarded to Public Service Television. This order if sustained, will put petitioner off the air and terminate its broadcast operations in Miami. The decision of the court below, affirming this revocation of petitioner's construction permit violates fundamental due process of law. Section 312 of the Act requires that the Commission must, before revoking a permit, (a) issue an order to show cause why the permit should not be revoked, which order must contain specific allegations and notice of intention to revoke; and (b) hold an evidentiary hearing in which both the burden of proceeding with the introduction of the evidence and the burden of proof shall be on the Commission. The Commission complied with none of these statutory requirements. It did not issue an order to show cause and it did not hold an evidentiary hearing at which it assumed the burden of proof. It specifically refused to assume the burden of proof, p. 8, *supra*. The Commission has erroneously based its revocation order, and the court below has erroneously affirmed that revocation, on a limited factual inquiry before Judge Stern (J.A. 142, 147, 357)—an inquiry which did not contain the statutory procedural or substantive safeguards. Substantially similar procedure has been followed by the Commission in other cases resulting from the Harris Committee disclosures. See, e.g., *Massachusetts Bay* v. *F.C.C.*, 261 F. 2d 55 (C.A.D.C.); *Sangamon Valley Television Corp.* v. *F.C.C.*, 269 F. 2d 217 (C.A.D.C.); *WORZ* v. *F.C.C.*, 268 F. 2d 889 (C.A.D.C.). The Commission's

action, approved by the court below, deprives petitioner of the statutory proceeding to which it is entitled under the Act as the holder of a construction permit under which it has built and operated a television broadcast station. Moreover, because the Commission's action, contrary to the express provisions of the Act, affects a number of other similar pending cases affecting major television broadcast stations, and represents the test case of the so-called ex parte cases, a question of substantial importance is clearly posed.

4. Judge Stern, the special hearing examiner, concluded that the facts as found in the supplemental hearing could not, standing alone, support absolute and automatic disqualification. In his view, effectuation of the statutory public interest standard required the Commission to give full consideration to "all relevant factors, financial, technical, experience, planning, and the numerous other requisite qualifications that enter into the question." (S.J.A. 29 FCC 237). The Commission relying on this Court's decision in the *WOKO* case, *supra*, refused to consider these other relevant considerations and proceeded to resolve the ultimate question of licensee qualifications on the limited evidence adduced at the remanded hearing.

The failure and refusal of the court below in its decision to deem relevant the counterbalancing qualifications of petitioner, the circumstances of the case, and the public interest in the service involved, are an unwarranted interpretation and application of this Court's decision in the *WOKO* case, requiring clarification by this Court. Considerations of the public interest, "the guiding star of the Commission" *F.C.C.* v. *WOKO*, 153 F. 2d 623, 631 (C.A.D.C.), warrant full weighing by the Commission, and review

by the court below, of all relevant factors, financial, technical, experience, planning, and the numerous other requisite qualifications that enter into the question, together with the evidence of misconduct. (S.J.A. 29 FCC 237). Moreover, petitioner has "a record of past reliability and candor to be considered by the Commission together with other circumstances." *Hall et al.* v. *F.C.C.*, 247 F. 2d 626 (C.A.D.C.) And, as the Commission has itself acknowledged in another so-called ex parte case, "the prevailing view at that time", respecting *ex parte* approaches, and the understanding of parties, practitioners, legislators and the Commission itself, is pertinent to the question of ultimate disposition of the matter, and is properly to be canvassed in the hearing.[6] The disregard of these relevant considerations by the Commission and the court below raises a substantial question concerning the scope and meaning of the statutory public interest standard.

5. Petitioner has constructed and established a television plant and associated facilities at a cost of

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[6] *Sangamon Valley Television Corp.*, 19 Pike & Fischer Radio Regulations 1055, 1056 e. Substantial evidence of "the prevailing view at that time" condoning, accepting, and encouraging ex parte approaches may be found in: Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Federal Communications Commission, Part 3, pp. 59-60 (1940); Vom Baur, 21 Journal of the Bar Association of the District of Columbia 99, 108 (1954); Note, "Ex Parte Contacts with the Federal Communications Commission", 73 Harv. L. Rev. 1178 (1960); H. Rep. No. 2711, 85th Cong., 2nd Sess., pp. 28-29 (1958); H. Rep. 2238, 86th Cong., 2nd Sess., pp. 22-25 (1961); Landis Report on Regulatory Agencies to the President Elect, 86th Cong., 2nd Sess., pp. 13-15, 53 (Committee Print, 1960). Such "prevailing view" is reflected in the limited scope of Section 409(c)(2).

$2,000,000. It has been broadcasting a full television program schedule since 1957. With its staff of 74 employees, it has gone to considerable effort to build good will in the community. The Commission's invalid revocation of petitioner's permit will reduce its plant value to a nominal figure, will render worthless valuable network and commercial relationships, will compel loss of staff and will in sum destroy petitioner as a going broadcasting concern.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

NORMAN E. JORGENSEN
WILLIAM I. DENNING

Attorneys for
Public Service Television, Inc.

2011 Eye Street, N. W.
Washington 6, D. C.

August 4, 1961

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13718, 14021, 14170

WKAT, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

PUBLIC SERVICE TELEVISION, INC.,
L. B. WILSON, INC., *Intervenors*

No. 13725

EASTERN AIR LINES, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

PUBLIC SERVICE TELEVISION, INC.,
L. B. WILSON, INC., *Intervenors*

No. 16089

NORTH DADE VIDEO, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

L. B. WILSON, INC., *Intervenor*

No. 16091

ELZEY ROBERTS, *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

L. B. WILSON, INC., *Intervenor*

Appeals from the Federal Communications Commission

Decided July 6, 1961

Messrs. A. Harry Becker and *Alexander Boskoff* for appellant in No. 16089.

Mr. J. Roger Wollenberg, with whom *Mr. Andrew G. Haley* was on the brief, for Elzey Roberts, appellant in No. 16091 and *amicus curiae* in Nos. 13718, 14021 and 14170.

Mr. Max D. Paglin, General Counsel, Federal Communications Commission, with whom *Mr. John L. FitzGerald*, General Counsel, Federal Communications Commission, at the time the brief was filed, and *Messrs. Joel Rosenbloom* and *James T. Brennan*, Counsel, Federal Communications Commission, were on the brief, for appellee. *Mr. Daniel R. Ohlbaum*, Assistant General Counsel, Federal Communications Commission, also entered an appearance for appellee in Nos. 13718 and 13725.

Mr. Norman E. Jorgensen, with whom *Messrs. William I. Denning* and *A. G. Hardy* were on the brief, for intervenor Public Service Television, Inc., in Nos. 13718, 13725, 14021 and 14170.

Mr. Robert A. Marmet, with whom *Messrs. Paul M. Segal* and *Edwin R. Schneider, Jr.*, were on the brief, for intervenor L. B. Wilson, Inc.

Mr. Lewis Bernstein, Attorney, Department of Justice, of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for the United States of America, as *amicus curiae*. *Messrs. W. Wallace Kirkpatrick, Richard A. Solomon*, and *Henry Geller*, Attorneys, Department of Justice, were on the brief for the United States of America, as *amicus curiae*.

Messrs. Paul A. Porter, G. Duane Vieth and *James O. Juntilla* were on the brief for appellant in Nos. 13718, 14021 and 14170. *Mr. George Bunn* also entered an appearance for appellant in No. 13718. *Mr. L. Reed Miller* also entered an appearance for appellant in No. 14021.

Messrs. E. Smythe Gambrell and *Harold L. Russell* were on the brief for appellant in No. 13725.

Before PRETTYMAN, WASHINGTON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: These are appeals from orders of the Federal Communications Commission. The controversy arose when mutually exclusive applications for a permit to construct a television station at Miami, Florida, were filed. An award was made to one of the applicants. It was appealed. While the appeals were pending substantially authoritative information came to the court indicating irregularity in the award. The court remanded the case for an evidentiary hearing on issues thus posed.[1] The Commission appointed a special master, who conducted extensive hearings and made findings, conclusions, and an initial decision. Exceptions

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[1] WKAT v. Federal Communications Comm'n, 103 U.S. App. D.C. 324, 258 F. 2d 418 (D.C. Cir. 1958).

being filed, the Commission held a hearing and entered a decision and order. It said, in part:

> "4. The Commission, after careful evaluation of the facts, is of the opinion that the misconduct of WKAT, Inc., North Dade Video, Inc., and Public Service Television, Inc., reflects so adversely upon their character as to demonstrate that they lack the qualifications to operate the station sought in this application. None of them was satisfied to be judged upon the record made in open hearing through the processes of adjudication specified by statute and grounded upon the principles of judicial fairplay; each of them sought to influence the results by factors unrelated to the merits of the case and not a part of the hearing record. Willingness thus to pervert the processes of administrative adjudication is convincing proof that the requisite character qualifications are lacking. Their misconduct is ' * * * of such moment as * * ' logically and rationally to give rise to the conclusion that the public interest, convenience, and necessity would not be served were * * * ' [citing cases] the applications in question, or any of them, granted."

The Commission issued an order disqualifying the three applicants named in the foregoing quotation.

The Supreme Court approached this subject in the *Hazel-Atlas* case.[2] A patent was there involved. It had been obtained by fraud on the Patent Office and sustained by carrying the fraud through to the Court of Appeals. The fraud was the preparation and publication of a spurious article purporting to be an authentic opinion of an expert used as evidence. Mr. Justice Black, writing for the Court, had this to say:

> "This matter does not concern only private parties. There are issues of great moment to the public in a

[2] Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944).

> patent suit. *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U.S. 661; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."[3]

The Court set aside the judgment which had been entered twelve years earlier, recalled its twelve-year-old mandate, dismissed the appeal, and issued a mandate to the trial court directing it to set aside its judgment upholding the patent and to reinstate its judgment against the patent. All of these were infringement suits. The Court wrote: "To grant full protection to the public against a patent obtained by fraud, that patent must be vacated."[4]

In *Root Refining Co.* v. *Universal Oil Products Co.*,[5] Circuit Judge Morris A. Soper wrote:

> "The client who with evil intent employs such an agent [*i. e.*, one who attempts by personal influence to control a judge or jury or who holds himself out as able to do so] fares no better in the instant case. To him also the doors of the courts are closed. From

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[3] *Id.* at 246.

[4] *Id.* at 251.

[5] 169 F. 2d 514, 541 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949).

> the moment that he ceases to depend upon the justice of his case and seeks discriminatory and favored treatment, he becomes a corrupter of the Government itself and is fortunate if he loses no more than the rights he seeks to obtain."

This doctrine applies to the adjudicatory functions of an administrative agency. This is not a mere technicality. Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence, eat at the very heart of our system of government—due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

We do not have here an ordinary case of "unclean hands", in which counterbalancing considerations of public interest in the service involved might justify awards despite misbehavior.[6] This case concerns corrupt tampering with the adjudicatory process itself. No public interest in service or capacity for service is paramount to the public interest in the integrity of the adjudicatory processes of government, the Commission concluded. The order proposed to be adopted by the Commission is well within its authority, the breadth of which is well illustrated by the order approved in *Massachusetts Bay Telecasters, et al.* v. *Federal Communications Comm'n.*[7]

One of the original applicants, L. B. Wilson, Inc., was not involved in irregular activities. It was found qualified by the Commission, and the Commission directed that its application be granted, subject to the proviso that any

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[6] See, for example, the discussion in Federal Communications Comm'n v. WOKO, 329 U.S. 223, 229 (1946).

[7] Nos. 13896 and 13899, D.C. Cir. (Order, Jan. 19, 1961).

license issued upon completion of the construction be for four months and no longer. This latter action by the Commission was for the purpose of resolving a difficult practical problem. The operator who was on the air was one of the applicants found unqualified; but a license to L. B. Wilson for a full term, without comparative consideration with any new applicants, would give Wilson a measure of advantage which, in view of all the surrounding circumstances, was deemed by the Commission to be unwise. We think the decision reached by the Commission was well within its authority and was a reasonable one. It was seeking to sustain the public interest in respect to continuing television service to the viewing public in the Miami area. Closing the station entirely was an alternative not required in the circumstances. Accordingly the course followed may be approved.

A procedural problem is presented which arises from the terms of our remand. The question is whether we meant the Commission to enter orders, subject to review on appeal, or whether we meant the Commission to formulate the orders it deemed appropriate and then to report its recommendations to us. The latter is our view. In our remand order we specifically retained jurisdiction of the appeals. This was in accord with the intendment of the Act of December 29, 1950,[8] as amended August 28, 1958.[9] The second sentence of Section 7(c) of that Act[10] provides that an agency "shall file in the court" its findings and order upon a remand for the adducement of additional evidence. This obviously means, we think, that the case remains in the court during the remand and that the court should consider the new findings and order upon the filing thereof by the agency. We think this

[8] 64 STAT. 1129, 1130.

[9] 72 STAT. 951.

[10] 5 U.S.C. § 1037(c) (1958).

statute does not contemplate that the agency can moot an appeal during a remand and thus foreclose court consideration of its conclusions upon the additional evidence. Our views on various aspects of this phase of our problem have been stated in *McClatchy Broadcasting Co.* v. *Federal Communications Comm'n.*[11]

The original grant of award, which is the order brought here by the original appeals, will be set aside, and the case is remanded to the Commission for entry of the order it now proposes consequent to its findings after the adducement of the additional evidence upon the remand. If we were to treat the order of the Commission now before us (dated July 14, 1960) as a final order before us upon the appeal of North Dade Video, we would affirm it.

It is our understanding that the Commission contemplates consideration of other applications for the station, if any are offered, when the matter of a full-term license comes before it, and it will then follow whatever proceedings are appropriate under the circumstances at that time. Its decision then will of course be subject to review here upon appeal.

So ordered.

Judgment

These appeals came on to be heard on the records from the Federal Communications Commission, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that these cases are remanded to the Federal Communications Commission with directions to set aside the order of the Federal Communications Commission

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[11] 99 U.S. App. D.C. 199, 203-204, 239 F. 2d 19, 23-24 (1956), *cert. denied*, 353 U.S. 918 (1957).

entered February 8, 1957, granting the application of Public Service Television, Inc., for a construction permit for a new television station to operate on Channel 10, Miami, Florida, and for further proceedings consistent with the opinion of this court this day filed in these cases.

PER CIRCUIT JUDGE PRETTYMAN

Dated: July 6, 1961